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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ERNESTO ORNELAS,<br><br>Defendant and Appellant. | B284515<br><br>(Los Angeles County Super. Ct. No. TA138348) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Kelvin D. Filer, Judge. Affirmed.

Moaddel Law Firm, Nadezhda M. Habinek, Claudia Martinez and Jeffrey Lewis for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Ernesto Ornelas impersonated his estranged wife on her Facebook account to lure victim Miguel Evora (one of his wife's friends) to defendant's residence. There, defendant murdered Evora, dismembered and discarded his body, and set fire to defendant's residence. Defendant appeals his convictions for first degree murder with firearm and lying-in-wait enhancements, arson of an inhabited structure, stalking his estranged wife, and two counts of misdemeanor contempt of court for violating an order protecting her. He raises six issues on appeal: (1) reappointment of the public defender after withdrawal of his retained counsel deprived him of his constitutional rights, (2) insufficient evidence supported his conviction for arson of an inhabited dwelling, (3) the court abused its discretion in admitting Facebook records, (4) the court also abused its discretion when it excluded evidence of third-party culpability, (5) his attorney rendered ineffective assistance of counsel, and (6) newly enacted Senate Bill 620 (2017-2018 Reg. Sess.) requires remand for resentencing. We affirm his convictions on all grounds.

## *FACTS AND PROCEDURAL BACKGROUND*

### 1. Defendant's History of Domestic Violence, Threats, and Jealousy

Defendant and Karina began dating in 2001, married in 2005, and had six children together. Their relationship was punctuated by defendant's domestic violence. Some of the violence caused physical injuries to Karina. Defendant regularly accused Karina of having affairs with other men, including members of her own family. He threatened Karina's cousin with a gun on one occasion after he accused the cousin of having a romantic relationship with Karina. Defendant's jealousy was an ongoing problem in their relationship.

### 2. Defendant Obtained Access to Karina's Facebook Account and Threatened Several of Karina's Male Friends

In January of 2015, Karina gave birth to her sixth child with defendant. Although she and defendant were estranged at the time, she allowed him to come to the hospital to attend the birth. Defendant took Karina's cell phone while she was in labor, and posted things to her Facebook account. After Karina gave birth, she noticed that she was unable to log into her Facebook account (the Karina account), which was under the name Karina. Karina attempted to change the password by having a temporary password sent to her e-mail address, but the e-mail associated with the Karina account had been changed to defendant's e-mail address. Defendant also had linked his telephone number to the account. Karina never used the Karina account again, and created a new account under a different name.

Beginning in mid-January 2015, defendant started sending threatening messages to Karina's male friends on Facebook via the Karina account. In a series of private messages to three men, defendant accused them of having a romantic or sexual relationship with Karina, and threatened their lives. In March 2015, defendant impersonated Karina in a message to one of the men, propositioning him to come to her home for sex. When the man responded negatively, defendant admitted he was trying to determine who was "messing with" Karina. Defendant then sent the man additional threatening messages, found the man's phone number, called the man 10 to 15 times per day to harass him, and threatened his life. From his own Facebook account, defendant messaged a fourth man, accusing the man of being involved with Karina. Defendant stated he intended to shoot the man and make him disappear.

In early 2015, defendant repeatedly accused Karina of cheating and threatened her life. On March 18, 2015, Karina obtained a temporary restraining order against defendant. He violated this order and subsequently pleaded no contest to the violation. Another protective order was issued against him. In June 2015, defendant was arrested for violating the new protective order when he jumped a fence at his mother-in-law's home, where Karina resided with the children.

In August of 2015, defendant asked Karina to reconcile with him. She acquiesced, but they continued to live separately. Karina lived with her mother and defendant lived at a house on Imperial Highway in the City of Lynwood, where he once lived with Karina and her children. During this time, Karina sent defendant photographs of herself via Facebook messages; she did not share the photos with anyone else.

On September 15, 2015, Karina and her children spent the night with defendant at his residence. The next day, as part of his employment with Luna Truck Lines, defendant and a second driver drove a long-haul truck to Colorado. Karina and her children spent one more night at defendant's residence while he was away. On September 17, 2015, Karina cleaned the residence and left with the children.

**3. Evora's September 19, 2015 Murder**

On September 18, 2015, at 11:38 p.m., while defendant was travelling back from Colorado, defendant once again impersonated Karina, using the Karina Facebook account to message Miguel Evora, the murder victim in this case. Evora was a friend of Karina's, with whom defendant had accused Karina of having had an affair. In August or September 2015, Evora had texted Karina asking to hang out and Karina declined. Around the time of this exchange, defendant discovered the text messages, became angry, and questioned Karina about them.

In the September 18, 2015 Facebook messages to Evora, defendant (pretending to be Karina) flirted and invited Evora over to defendant's home to have sex, under the pretense that defendant was not home. During their conversation, Evora asked more than once to talk to Karina on the phone. To avoid telephonic contact, defendant replied, "don't call me on my *phone* my ex sees everything." Evora asked Karina to send him a picture of herself. In response, defendant sent Evora photographs that Karina had recently sent to defendant through her new Facebook account. Evora agreed to meet Karina around 5:00 a.m.

Video surveillance from the Bank of America, located next to defendant's residence, showed defendant parking a vehicle on Imperial Highway at 4:43 a.m. and walking up the driveway towards his residence. Defendant then walked to the bank and made a transaction at the ATM at 4:50 a.m.[1] Defendant returned to his residence at 5:00 a.m. At 5:05 a.m., defendant sent Evora a message from the Karina account stating that he was "ready now," and gave Evora detailed directions to the residence and where to park in a series of messages.

Surveillance footage showed Evora park his black vehicle on Imperial at 5:49 a.m. Evora then messaged Karina, "I'm here. Come out." Defendant instructed Evora to walk down a driveway to his residence and told him to enter the house with a green Mustang parked outside.[2] Evora was depicted on the

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[1] The jury watched the surveillance footage at trial and saw still photographs taken from that footage.

[2] Defendant owned two vehicles: a Mercury Sable, which he usually parked on Imperial Highway, and a green Mustang, which he parked next to his house.

surveillance footage crossing the street and approaching defendant's residence at 5:59 a.m.

Evora was never again seen alive and there was no further activity on his cell phone or social media accounts. Defendant was depicted on the bank surveillance footage leaving his residence in a different shirt at 6:24 a.m. and driving away in his Mercury Sable. Evora's vehicle was depicted on the surveillance footage being driven from Imperial Highway, where Evora had parked it, down a driveway adjacent to defendant's residence at 7:08 a.m.[3] The driveway led to a carport adjacent to defendant's building, where the vehicle could not be seen on the footage. Evora's vehicle departed from that same driveway at 7:18 a.m.

**4. Arson of Defendant's Residence**

At noon on September 19, 2015, defendant reinstated his full-coverage automobile and renter's insurance policies (the latter covered property loss from fire), as they had lapsed from nonpayment. The next day, the surveillance cameras from Bank of America recorded a person walking up defendant's driveway at 11:38 p.m. Sixteen minutes later, there was a large flash and the same individual ran from defendant's residence.

The Los Angeles County Fire Department responded minutes later and took three hours to extinguish the flames at defendant's residence. Based on the nature of the fire, firefighters believed that an accelerant had been used. They recovered a gas can from defendant's residence and found the front and back security doors of the residence unlocked at the time of the fire.

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[3] In the Facebook correspondence between the Karina account and Evora, defendant elicited a description of Evora's car: a black Ford Focus.

When the police contacted defendant and informed him of the fire, he stated that he was in San Diego and could not return home because he had been drinking. The next day, defendant filed an claim with his insurance company claiming property loss resulting from the fire. When questioned, defendant told police that his residence had been locked when he had left it a few hours prior to the fire, and that Karina was the only other person who had keys to the residence. Defendant stated that he had been attending a party in Tijuana at the time of the fire.

**5. Discovery of Evora's Body**

Evora's black Ford Focus was seen parked along a residential street in San Bernardino on the morning of September 21, 2015, two days after the murder. Two days later, a resident notified police when he noticed a foul odor emanating from the car and the presence of flies around it. Police officers investigated and found two plastic bags inside the trunk containing human remains, which were determined to be Evora's. An autopsy revealed that Evora died as a result of three gunshot wounds to his neck, chest, and arm. His body was dismembered postmortem with a jagged tool, like a saw. Evora's body had decomposed to a point that was consistent with his having been dead for two to seven days from the date it was discovered.

**6. The Homicide and Arson Investigation**

At the time he died, Evora had been living with his family. His younger brother grew worried when Evora failed to answer his phone, respond to text messages, or return home. The brother logged onto Evora's account (he knew Evora's password) and discovered the messages sent between Evora and the Karina account. The brother then filed a missing person report.

On September 24, 2015, following the identification of Evora's body, detectives obtained copies of Evora's Facebook

messages from the brother. The Facebook messages connected Evora's murder with defendant's residence.

The Los Angeles County Sheriff's Department arson experts examined defendant's home and determined that the fire had been deliberately set in the living room via application of an open flame to combustible material and accelerated with gasoline. Despite the heavy fire damage, detectives recovered a sheet, pillowcase, and shorts all with blood stains on them from defendant's living room. DNA testing established that Evora's blood was present on all three items. Samples from the sheet, shorts, and debris from the living room also all tested positive for the presence of gasoline.

Detectives recovered a reciprocating saw, missing a blade, from defendant's living room. A second saw, with a round blade, was recovered from the same area. The detectives discovered a nine-millimeter handgun, various gun cartridges, and ammunition at the residence, and two cartridges loaded with nine-millimeter ammunition inside defendant's green Mustang. A forensic analysis of the ballistics evidence showed that the three bullets recovered from Evora's body were consistent with nine-millimeter ammunition and had been fired from the same weapon, but had not been fired from the weapon recovered from defendant's home.

Detectives obtained the video surveillance footage from the Bank of America next to defendant's residence, the pertinent parts of which have been described above. Detectives also acquired cell phone and Facebook records pertaining to defendant and Evora. Based on cell tower locations and cell phone records,

police were able to determine the general geographic area of the phones when in use for calls or texts.[4]

Defendant's phone records showed that his phone travelled from the Las Vegas area to his residence in the early hours of September 19, 2015 (the morning of the murder), and that his phone used a cell tower in the area of his residence between 4:47 a.m. and 5:28 a.m.[5] Defendant's phone was not used again until 9:49 a.m., when it made various phone calls utilizing a cell tower in the area of defendant's residence until 1:32 p.m. Cell phone records also showed that defendant's phone travelled south toward San Diego on September 20, 2015 (the date of the arson) after 10:46 p.m., moved toward the Mexican border just after midnight, and returned to his residence around 10:30 a.m. the next day.[6]

Cell phone records showed that Evora's phone used a cell tower near his own residence between 11:01 p.m. and 11:46 p.m. on September 18, 2015, and again at 5:22 a.m. the next morning. Later that morning, Evora's cell phone received seven incoming calls between 7:57 a.m. and 10:09 a.m., which went directly to voice mail, and utilized a cell tower near defendant's residence.

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[4] Police also analyzed Karina's phone records, which showed her cell phone remained at her mother's home on September 18 and 19, 2015.

[5] Defendant made several phone calls during this time period, including one to AAA. Video surveillance footage shows defendant meeting a AAA truck in front of his home shortly before the murder.

[6] The People prosecuted the arson on an aiding and abetting theory as the evidence indicated defendant was in San Diego at the time of the crime.

Detectives also analyzed Internet Protocol (IP) address information for the Facebook accounts. The IP addresses showed that the Karina account user was traveling in the early morning hours of September 19, 2015, as the IP addresses were dynamic and consistent with use of a data plan away from the user's home. At around 5:00 a.m. on the morning of the murder, the Karina account user began connecting through a single, static IP address. This static IP address usage was consistent with the user being connected to the internet at their residence.

Police also reviewed the Facebook records associated with defendant's own account. In messages defendant sent to numerous individuals from his own account, including messages expressly stating that defendant was home at the time, the IP address used was the same static IP address used to send messages to Evora from the Karina account shortly before the murder. This same IP address was used by defendant to upload photos of himself and his green Mustang parked outside of his residence on prior occasions, and send the threatening Facebook messages to the four men.

**7. Defendant's Efforts to Interfere with Prosecution**

Following defendant's arrest, defendant continued to communicate with Karina. After defendant's preliminary hearing, both defendant and his mother asked Karina to change her testimony. Defendant placed a call to Karina from jail, asking her to state that she had brought Evora to his residence at some point, so that he could explain the presence of Evora's blood in his living room. Defendant also asked his cousin to delete defendant's Facebook account. The cousin complied.

**8. Charges and Pretrial Events**

On October 9, 2015, a felony complaint was filed against defendant. At arraignment, defendant was represented by the public defender's office and entered a not guilty plea. On

November 3, 2015, defendant appeared at a pretrial hearing represented by retained counsel Andrew Flier. The trial court granted defendant's request to substitute Mr. Flier as counsel, and relieved the public defender's office. Mr. Flier represented defendant during pretrial proceedings and through the May 18, 2016 preliminary hearing.

On May 27, 2016, Mr. Flier filed a Motion to Appoint Counsel Already Representing Defendant, in which Mr. Flier sought appointment pursuant to Penal Code section 987.2, subdivision (a).[7] Mr. Flier's declaration in support of the motion indicated defendant could not pay for trial counsel and that Mr. Flier was unable to litigate the case unless appointed by the court.

On June 1, 2016, the Los Angeles County District Attorney's Office filed an information charging defendant with special circumstance murder, arson of an inhabited structure or property, misdemeanor disobeying a court order, and stalking. The information further alleged that defendant personally discharged a firearm during the commission of count 1. That same day, defendant appeared for arraignment represented by Mr. Flier. The trial court denied Mr. Flier's request for appointment, relieved him as counsel, and appointed the public defender. We provide additional factual information on this subject in our discussion.

**9. Trial, Verdict, and Sentence**

The jury trial commenced in March 2017. At trial, the People introduced testimony from Karina, police officers, sheriff's deputies, detectives, criminalists, a forensic specialist, a forensic pathologist from the coroner's office, Evora's brother, witnesses

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[7] All subsequent statutory references are to the Penal Code unless indicated otherwise.

who discovered Evora's car with his decomposing body inside, defendant's insurance agent, and a City of Lynwood Fire Department captain establishing the facts described above. The People also introduced the Facebook and cell phone records involved in this case. Defendant presented testimony from his neighbors, family members, Evora's ex-girlfriend, and a computer forensic examiner.

The jury found defendant guilty of all counts, and found the special circumstance and firearm enhancement allegations to be true. For the first degree murder conviction, the trial court sentenced defendant to life without the possibility of parole, plus a consecutive term of 25 years to life for discharge of a firearm causing death (§ 12022.53, subd. (d)). The court also sentenced defendant to a consecutive term of one year, eight months for arson, a consecutive term of 8 months for stalking Karina, and 180 days, credit time served, for the two misdemeanor counts for violating the order protecting Karina. Finally, the court imposed and stayed firearm enhancements under sections 12022.53, subdivision (b) (use) and 12022.53, subdivision (c) (discharge). The trial court awarded defendant 674 days of actual custody credit and zero days of local conduct credit.

Defendant filed a timely notice of appeal.

## *DISCUSSION*

### 1. The Trial Court Lawfully Appointed the Public Defender

Defendant contends the trial court abused its discretion and violated his constitutional right to counsel of his choice when the court reappointed the public defender's office pursuant to section 987 after defendant's retained counsel indicated that without appointment by the court, he could no longer continue representing defendant. Defendant asserts that instead the court should have appointed his retained counsel. Generally, we

review errors in the appointment of specific counsel under the abuse of discretion standard. (*People v. Horton* (1995) 11 Cal.4th 1068, 1098 (*Horton*).) The mere failure to appoint a particular attorney is generally not an abuse of discretion. Here, we also consider the interpretation of a statute, section 987.2. This review is de novo. (*People v. Morales* (2018) 25 Cal.App.5th 502, 509.)

Section 987 et seq. provide for appointment of counsel in any criminal case where the defendant financially is unable to employ an attorney. Section 987.2 states: "In a county [such as Los Angeles], *the court shall first utilize the services of the public defender to provide criminal defense services for indigent defendants*. In the event that the public defender is unavailable and the county and the courts have contracted with one or more responsible attorneys or with a panel of attorneys to provide criminal defense services for indigent defendants, the court shall utilize the services of the county-contracted attorneys prior to assigning any other private counsel. Nothing in this subdivision shall be construed to require the appointment of counsel in any case in which the counsel has a conflict of interest. In the interest of justice, a court may depart from that portion of the procedure requiring appointment of a county-contracted attorney after making a finding of good cause and stating the reasons therefor on the record." (§ 987.2, subd. (d), emphasis added.)

Defendant's argument essentially asks us to ignore the statutory mandate. We will not.

In *Williams v. Superior Court* (1996) 46 Cal.App.4th 320, 326 (*Williams*), this Division explained that pursuant to section 987.2, "Trial courts in Los Angeles County are required to appoint the public defender, subject to availability and in the absence of a conflict of interest. . . . This provision allows for a deviation in the requisite order of appointment of the second

public defender or the county-contracted attorney, but not for the requirement that the public defender be utilized first." *Alexander v. Superior Court* (1994) 22 Cal.App.4th 901, 910, likewise reiterated that under section 987.2, the public defender must first be appointed unless there is a conflict.

We see no error here, as the trial court applied the correct statutory command. Under these circumstances, once Mr. Flier declared he could no longer represent defendant without payment, the trial court was duty bound to appoint the public defender. Only if the public defender had declared a conflict, would the trial court have been able to exercise discretion to appoint counsel per section 987.2. As there was no conflict or other obstacle to appointing the public defender's office, the court properly denied defendant's request that the court should appoint Mr. Flier.[8]

Defendant cites *Harris v. Superior Court* (1977) 19 Cal.3d 786 (*Harris*), and *Horton, supra*, 11 Cal.4th at p. 1098, for the proposition that the court had the discretion to appoint Mr. Flier and abused its discretion by not doing so. These cases do not assist the defendant. In both, the public defender declared a conflict of interest and the trial court was obligated to appoint new counsel. (*Harris*, at p. 790; *Horton*, at p. 1095.) In the present case, the public defender *was* available. The trial court had no instance to consider the factors described in *Harris* and *Horton* for appointment of private counsel because the public defender here never declared a conflict.

As for defendant's argument that the court violated his Sixth Amendment right to counsel, that right to counsel of one's

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[8] Defendant mischaracterizes the court's refusal to appoint Flier as "firing" his chosen counsel. The record does not support this assertion.

choice applies only to retained counsel. "The Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.' . . . [A]n element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144.) Our Supreme Court has "repeatedly held that constitutional and statutory guarantees are not violated by the appointment of an attorney other than one requested by a defendant." (*Drumgo v. Superior Court* (1973) 8 Cal.3d 930, 933-934.)

**2. Substantial Evidence Supports Defendant's Conviction for Arson of an Inhabited Structure**

Defendant contends that the evidence presented at trial was insufficient to support his conviction for arson of an inhabited structure or property as alleged in count 2. Specifically, defendant claims "no evidence was presented that the building was 'inhabited' by anyone other than appellant." We review the record in the light most favorable to the judgment to determine if there is substantial evidence from which any rational trier of fact could find each element of the crime beyond a reasonable doubt. (*People v. Osband* (1996) 13 Cal.4th 622, 690.) A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the jury's verdict].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Section 451 provides: "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property." Where the structure or property burned is "inhabited," the crime is "a felony punishable by imprisonment in the state prison for three, five, or eight

years." (§ 451, subd. (b).) " 'Inhabited' means *currently being used for dwelling purposes whether occupied or not*." (§ 450, subd. (d), emphasis added; see also *People v. Vang* (2016) 1 Cal.App.5th 377, 385 (*Vang*).)

Defendant does not dispute that an arson of a structure occurred. He asserts that the evidence was not sufficient to show the structure was inhabited at the time of the fire and in any event, the statute does not apply if it is the defendant who is the inhabitant of the burned structure. For support, defendant quotes subsection (d) of section 451, which states: "Arson of property is a felony punishable by imprisonment in the state prison for 16 months, two, or three years. For purposes of this paragraph, arson of property does not include one burning or causing to be burned his or her own personal property unless there is an intent to defraud or there is injury to another person or another person's structure, forest land, or property." Defendant also cites *Vang, supra*, 1 Cal.App.5th at page 386, for the principle that at least one person must intend to continue living in the house to satisfy the "inhabited" requirement. Defendant claims, "no evidence was presented that anyone other than appellant inhabited the property that was burned" and there is no evidence that he or anyone else intended to live in the building after the fire.

Defendant is wrong on the law. Section 451 does not require that someone other than the defendant inhabit the structure. Subdivision (d), which defendant highlights as excluding his own property from arson, applies to personal property, not the real property at issue here.

In *Vang*, the court held that the defendant who murdered the sole occupant of a building and then set fire to the structure could not be guilty of arson of an inhabited structure, stating: "the death of a structure's inhabitant renders that structure

uninhabited within the meaning of the arson statute. This is so even where the arsonists murder that inhabitant before setting fire to the structure." (*Vang, supra*, 1 Cal.App.5th at p. 379.) Here, defendant did not murder an inhabitant rendering section 451, subd. (b) inapplicable. On the contrary, at the time of the arson, the building was indeed inhabited by defendant himself.

The clothing found in the location itself provided sufficient evidence. A reasonable jury could conclude that at the time of the fire, defendant still resided in this structure.

**3. The Court Did Not Abuse Its Discretion in Admitting Facebook Records**

Defendant contends the court abused its discretion by admitting Facebook records without proper foundation. The records were admitted under the business record exception to the hearsay rule, with an authenticating affidavit from the Facebook custodian of records and testimony from the detectives who prepared the search warrant for the records and who had expertise in electronic communications and records of this sort.

***a. Overview: Authentication by Affidavit of Electronic Communication Records Seized Under a Search Warrant***

California law provides a streamlined procedure for the introduction into evidence of copies of electronic communication business records seized pursuant to a search warrant. This procedure permits a party to use an affidavit authenticating the records in lieu of live testimony. (See Pen. Code, § 1524.2; Evid. Code, §§ 1561 & 1562.) Before turning to the merits of defendant's argument, we explain the interplay among various statutes.

Section 1524.2, provides that when a search warrant issues allowing a search for records that are in the possession of a company that "provides electronic communication services or

remote computing services to the general public" (§ 1524.2, subd. (b)), the company "shall verify the authenticity of records that it produces by providing an affidavit that complies with the requirements set forth in" Evidence Code section 1561, and those "records shall be admissible in evidence as set forth in" Evidence Code section 1562 (§ 1524.2, subd. (b)(4)).[9]

Evidence Code section 1561, subdivision (a), provides that an affidavit from a custodian of records "or other qualified witness" accompanying records provided in response to a search warrant "shall" state "in substance each of the following: [¶] (1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records. [¶] (2) The copy is a true copy of all the records described in the . . . search warrant. . . . [¶] (3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event. [¶] (4) The identity of the records. [¶] (5) A description of the mode of preparation of the records." (See *Cooley v. Superior Court* (2006) 140 Cal.App.4th 1039, 1045 [explaining amendments to Evidence Code section 1561 to ensure business record admissibility without live testimony].)

Lastly, Evidence Code section 1562, provides: "If the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified to the matters stated in the affidavit, and if the requirements of [Evidence Code section] 1271 have been met, the copy of the records is admissible in evidence. The affidavit is admissible as evidence of the matters stated therein pursuant to [Evidence

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[9] The statute applies to " '[f]oreign corporation[s]' " which is in turn defined as any corporation qualified to do business in California. (§ 1524.2 (a)(5).) No issue is raised as to Facebook's corporate status.

Code section] 1561 and the matters so stated are presumed true. . . . The presumption established by this section is a presumption affecting the burden of producing evidence."[10] (Evid. Code, § 1562.)

The People have the burden of establishing that these foundational requirements have been met. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1011.) A trial court has broad discretion to determine whether sufficient foundation has been made and whether a qualified witness possessed sufficient personal knowledge of the identity and mode of preparation of documents for purposes of the business records exception. (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 319 (*Jazayeri*); *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 797 & fn. 28.) A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

***b. The Evidence From Facebook***

Both pretrial and in trial, San Bernardino Police Sergeant Jason King testified how he obtained the records from Facebook. Sergeant King testified that he had been assigned to a fugitive apprehension task force "hosted by the FBI." Sergeant King explained that in conjunction with his work on the task force, he had been trained in acquiring records pertaining to electronic

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[10] These requirements are consistent with the elements of the business record exception to the hearsay rule in Evidence Code section 1271: "(a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

communications, including Facebook records. Sergeant King had authored more than 50 search warrants for Facebook records, reviewed hundreds of Facebook accounts, and created Facebook accounts in an undercover capacity to further investigations. He had also received training on how Facebook records were stored and maintained. Sergeant King explained that Facebook records are kept in the regular course of business, and that they are saved electronically by Facebook at or near the same time the information is transmitted by the user. When someone sends a message from a Facebook account, it is automatically stored electronically by Facebook.

Sergeant King testified that he participated in the Evora murder investigation and authored a search warrant for Evora's Facebook records. After a judge signed the warrant, Sergeant King served the search warrant on Facebook electronically via a "law enforcement portal." He received the records back from Facebook in a secure PDF form that cannot be manipulated or changed. Accompanying the records was a notarized certificate of authenticity of Domestic Records of Regularly Conducted Activity from Facebook. The certificate of authenticity, signed by the records custodian and dated January 10, 2017, stated:

> "Under [California Evidence Code section] 1561, I, Beth Jarvis, certify:
>
> "1 I am employed by Facebook Incorporated ('Facebook'), headquartered in Menlo Park, California. I am a duly authorized custodian of records for Facebook[,] and I'm qualified to certify Facebook's domestic records of regularly conducted activity.

"2 I have reviewed the records produced by Facebook in this matter in response to the [s]earch [w]arrant received on September 25, 2015. The records include search results for basic subscriber information, IP logs, messages, photos, other content and records for 100010149333072.

"3 The records provided are an exact copy of those that were made and kept by the automated systems of Facebook in the course of regularly conducted activity as a regular practice of Facebook. The records were saved in electronic format after searching Facebook's automated systems in accordance with the [s]earch [w]arrant. The records were made at or near the time information was transmitted by the Facebook user.

"4 Under the laws of the State of California, I declare under penalty that the foregoing certification is true and correct to the best of my knowledge."

We observe that nearly identical certificates of authenticity were issued by the Facebook custodian of records in response to a subsequent search warrant for several Facebook accounts held by defendant.

The trial court admitted the Facebook records under section 1524.2, subdivision (b)(4), based on the declaration from Facebook's custodian of records, and alternatively, that Sergeant King was qualified to lay the foundation for the admission of those records.

After Evora's Facebook records were admitted into evidence, the People sought to introduce additional Facebook

materials obtained by two other detectives. Defendant registered a continuing objection to those records. When the second detective testified later in the trial, he told the jury he had authored search warrants for the other Facebook accounts involved in the police investigation and that he received the records as unalterable PDFs from Facebook through a secured law enforcement portal. He testified that he received the records with certificates of authenticity signed by Beth Jarvis.

Following the guilty verdicts, defendant filed a motion for new trial arguing that the Facebook records were wrongfully admitted and that the Facebook custodian was required to testify at trial to provide foundation for them. The court denied the motion, finding that the records had properly "come in as business records exception pursuant to Evidence Code section[s] 1271, 1561, and 1562." The court also noted there was "a ton of circumstantial evidence that corroborated and supported the information that came through those Facebook records."

**c. *The Trial Court Did Not Abuse Its Discretion***

We conclude that the trial court did not abuse its discretion when it admitted the Facebook records. The certificates of authenticity accompanying the records satisfied the Evidence Code section 1561 requirements. The certificate was written by the Facebook custodian of records who attested to being "qualified to certify Facebook's domestic records of regularly conducted activity." The custodian identified the records as a true copy of those sought in the search warrant. The custodian attested the records are kept in the regular course of business by Facebook at or near the time the information was transmitted by the Facebook user. The affiant next explained the records were prepared by searching Facebook's automated systems in accordance with the search warrant and saving the results in electronic format. As the affidavit satisfied Evidence Code

section 1561, pursuant to section 1524.2 and Evidence Code section 1562, the records were admissible without further live testimony from the Facebook custodian of records.

Defendant argues that the certificates of authenticity failed to satisfy Evidence Code section 1561's third and fifth requirements, which are:

> "(3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event"
>
> and
>
> "[¶] . . . [¶]
>
> "(5) A description of the mode of preparation of the records." (Evid. Code, § 1561.)

As to the third requirement, defendant asserts that Facebook posts can be altered by the user and that the affidavit failed to explain how these edits are documented in the Facebook records. Defendant also opines that the records produced do not look like the Facebook profile printed off the internet. Regarding the fifth requirement, defendant argues that the certificate of authenticity "does not explain how the search of Facebook's automated systems occurs, or how the decision is made (whether automated or not) to include any particular piece of information in the record provided to law enforcement."

We disagree that the certificate's authenticity was inadequate. As to the third element, the custodian of records attested: "The records provided are an exact copy of those that were made and kept by the automated systems of Facebook in the course of regularly conducted activity as a regular practice of Facebook. The records were saved in electronic format after searching Facebook's automated systems in accordance with the [s]earch [w]arrant. The records were made at or near the time the information was transmitted by the Facebook user." The

custodian's affidavit explains how edited Facebook posts are documented and their mode of preparation: an exact copy of the user's transmission is recorded by the automated system at or near the time it is made. That the Facebook internal records do not resemble the user interface is irrelevant. The trial court reasonably could have found from the custodian's affidavit that the documents introduced at trial show the records as they appear when retrieved from Facebook's database pursuant to the warrant.

**4. Exclusion of Defense Evidence Intended to Show Third-Party Culpability Was Not an Abuse of Discretion**

Defendant argues the court abused its discretion in granting the People's motion to exclude defense evidence proffered to show third-party culpability.

***a. Law of Third-Party Culpability Evidence and Its Exclusion***

At trial, defendant intended to proffer evidence about Esteban Rocha Perez's motive to kill Evora. Specifically, defendant wanted to elicit testimony from Perez showing that Evora had stolen money, a car, and other items from him. Defendant also intended to introduce testimony from Evora's parents, who would state that several weeks prior to Evora's disappearance, Perez showed up at their family home with a "hitman" and demanded payment of $3,000 that was due to him by Evora. The family felt sufficiently scared that they began making installment payments to Perez, and when Evora first went missing, they reported Perez's threat to law enforcement. Defendant also intended to show that Perez drove a green Mustang, just like defendant. One of the last Facebook messages sent from Evora after he had arrived at defendant's residence stated: " 'I'm standing next to the green Mustang.' "

Prior to trial, the prosecutor filed a motion in limine seeking the exclusion of any third-party culpability evidence related to Perez. At the hearing, the prosecutor explained that after Evora's body was discovered, detectives had gone to the home of Evora's family and asked whether anyone had threatened Evora prior to his death. Evora's mother told detectives that in July of 2015, three months before Evora's murder, Perez came to the family home and told her that Evora owed him money because Evora stole a car from Perez, a car later found abandoned in San Bernardino. Evora's mother took Perez's statements as a threat, and she started to pay Perez installments on Evora's behalf. Perez provided her with receipts for her payments. Detectives then contacted Perez at his residence. He was unaware that Evora had been killed. Perez consented to a search of his residence and the storage facility he rented. Detectives discovered nothing in either of the searches connecting Perez to the murder.

The prosecutor asked the trial court to exclude any evidence relating to Perez as irrelevant, prejudicial, and confusing, because nothing linked Perez to the commission of the offenses. Defense counsel opposed and made arguments regarding the green Mustangs and the fear Evora's family had of Perez.

The trial court asked the parties whether the victim's family had been paying the debt that Perez had alleged was due. The prosecutor and defense counsel agreed that the family had been paying the debt. Defense counsel told the trial court that the debt was originally $3,000, and Evora's family had paid $2,400 of it at the time of Evora's murder.

The trial court found that defendant had failed to show any link between Perez and the actual commission of the offenses. The court excluded any third-party culpability evidence

regarding Perez, noting that Perez would not even have had a motive to commit the murder because Evora's family was paying him the money that Perez claimed he was owed. The trial court also found the evidence inadmissible under Evidence Code section 352, based on the potential of the evidence to confuse and mislead the jury. The trial court noted, "[i]n the event that counsel believes that there has been some evidence which directly connects [Perez] to the offense, then that can always be brought to my attention, and I'll consider it at that point." Defendant did not raise the subject again before verdict.

Following the jury's verdicts, defendant moved for a new trial reasserting his claim that the trial court erred when it excluded defendant's third-party culpability evidence regarding Perez. The People opposed the motion. The trial court heard and denied defendant's new trial motion, finding that Perez's alleged motive to kill Evora had dissipated by the time of the murder, and "[t]here was no evidentiary link that [Perez] was connected to this crime at all."

***b. No Abuse of Discretion***

It is well established that "[a]ny relevant evidence that raises a reasonable doubt as to a defendant's guilt, 'including evidence tending to show that a party other than the defendant committed the offense charged,' is admissible." (*People v. Avila* (2006) 38 Cal.4th 491, 577.) Nonetheless, "evidence that another person had a motive or opportunity to commit the crime, without more, is irrelevant because it does not raise a reasonable doubt about a defendant's guilt; to be relevant, the evidence must link this third person to the actual commission of the crime." (*People v. Brady* (2010) 50 Cal.4th 547, 558 (*Brady*); Evid. Code, §§ 210, 350, 351.) "We review for an abuse of discretion a trial court's exclusion of evidence." (*Brady*, at p. 558.)

Here, defendant's proposed evidence was insufficient to raise a reasonable doubt about defendant's guilt because nothing connected Perez to the murder. Defendant's proffer established only that Evora's family had felt threatened when Perez came to their home and demanded money from Evora. However, as the trial court observed, Perez no longer had a motive to kill Evora because Evora's family had already paid most of the debt to Perez and were still making payments at the time of the murder. At most, the evidence showed tenuous motive, and motive alone is insufficient to establish relevance. (See *Brady, supra*, 50 Cal.4th at p. 558.)

Defendant points to the fact that both defendant and Perez had green Mustangs. This too was of little or no relevance because the evidence established that defendant's green Mustang was the one parked outside defendant's home, which he had recently insured with comprehensive insurance coverage before the arson and which subsequently suffered fire damage.

The fact that Perez's car (which Evora allegedly stole) was abandoned in San Bernardino, does not create a link between Perez and the murder. Nothing in the record indicates that Evora's body was found anywhere in the vicinity of Perez's abandoned car.

Lastly as our Supreme Court has held any error in excluding third-party culpability evidence is subject to a harmless error analysis. (*Brady, supra*, 50 Cal.4th at p. 559.) Here, evidence of Evora's blood in defendant's home, Facebook and cell phone records, video surveillance footage, and defendant's suspicious conduct tied defendant and no one else to the murder. There was no abuse of discretion in excluding defendant's evidence regarding Perez. Under either *Chapman v. California* (1967) 386 U.S. 18, 24, or *People v. Watson* (1956)

46 Cal.2d 818, 836, the evidence showing that defendant murdered Evora was overwhelming.

**5. Defendant Has Not Shown Ineffective Assistance of Counsel**

Defendant argues that his trial counsel was ineffective because she failed to investigate and present evidence about IP addresses and Facebook records. "A defendant has the burden of proving a claim of ineffective assistance of counsel by showing that (1) his or her trial counsel's representation fell below an objective standard of reasonableness and (2) he or she was prejudiced (i.e., there is a reasonable probability that a more favorable determination would have resulted in the absence of counsel's deficient performance)." (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1372.) Conclusory and speculative allegations of ineffective assistance are insufficient to warrant relief. (*People v. Karis* (1988) 46 Cal.3d 612, 656.) " ' "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " [Citation.] . . . "[C]ourts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" [citation].' " (*People v. Hinton* (2006) 37 Cal.4th 839, 876.) To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we must affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there could be no satisfactory explanation for counsel's conduct. (*People v. Gray* (2005) 37 Cal.4th 168, 207.)

Defendant contends that his trial counsel rendered ineffective assistance in failing to investigate and present evidence pertaining to: (1) Evora's IP address activity; (2) the

reliability of IP address data contained in the Facebook records; and (3) the reliability of defendant's Time Warner IP address and whether or not other individuals could have accessed that IP address. Defendant asserts his trial counsel should have presented expert witnesses to discuss "discrepancies in IP addresses as contained in the different exhibits," to "explain to the jury what an analysis of the devices themselves[] could have shown," to "explain to the jury that the Facebook IP address information is collected second- or third- hand information and may not be reliable," to opine "about whether the dynamic Sprint IP addresses coincided with [defendant's] route as he and his phone travelled from Colorado back to California," and to testify as to whether any other device could have used the same IP address defendant used when accessing his home internet account. Defendant also faults trial counsel for failing "to subpoena the Facebook records for the Karina [A.] account which may have contradicted the People's theory regarding IP address usage."

We observe nothing in the record that shows defense counsel failed to investigate this evidence or that further investigation would have unearthed evidence to cast doubt on the People's case. Defendant does not explain, let alone show through citation to the record, how these hypothetical witnesses would have testified or what the additional evidence likely would have shown. Defendant's claims of ineffective assistance are speculative. (*People v. Williams* (1997) 16 Cal.4th 153, 266 [speculation does not establish that a defendant received ineffective assistance]; *People v. Bolin, supra*, 18 Cal.4th at p. 345 [where defendant contends his counsel rendered ineffective assistance in failing to submit additional evidence, appellate court cannot infer anything about its existence, availability, or probative force, or the probable consequences of its use at trial].)

Defendant has not satisfied his burden to show ineffective assistance.[11]

**6. Defendant Is Not Entitled to Remand for Resentencing**

Defendant's sentence includes a 25-years-to-life firearm enhancement under section 12022.53, subdivision (d), on count 1. At the time of defendant's sentencing, the trial court had no authority to strike firearm enhancements proven under section 12022.53. (Former § 12022.53, subd. (h).) But Senate Bill No. 620, which became effective January 1, 2018, removed that prohibition. In its place, Senate Bill No. 620 added the following language to section 12022.53, subdivision (h): "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

Defendant seeks remand for resentencing under amended sections 12022.53, subdivision (d) and 12022.53, subdivision (h) to allow the trial court to exercise its discretion whether to strike the previously mandatory firearm enhancement. The People agree to a remand, but we are not persuaded.

First of all we acknowledge that Senate Bill No. 620 applies retroactively to all cases, such as defendant's, which are not yet final. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712; see *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303, 307-

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[11] Where the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, "[a] claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

309; *In re Estrada* (1965) 63 Cal.2d 740.) But it does not follow that remand is necessary in every case.

"' "Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record "clearly indicate[s]" that the trial court would have reached the same conclusion "even if it had been aware that it had such discretion." ' " (*People v. Chavez* (2018) 22 Cal.App.5th 663, 713; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) "[T]he egregiousness of a defendant's crimes, a defendant's criminal history, and the court's sentencing options and rulings may prompt the court to express its intent to impose the maximum sentence permitted. When such an expression is reflected in the appellate record, a remand would be an idle act because the record contains a clear indication that the court will not exercise its discretion in the defendant's favor." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 427.)

The trial court did not say much about the details of crime at the time of sentencing, focusing instead on the terrible pain suffered by Mr. Evora's family members, who were present in the courtroom. Nevertheless, the court found defendant's prior record significant and observed that his convictions were numerous and of increasing seriousness. The court then emphasized that "certainly the manner of the crime indicates planning, sophistication and professionalism." These oft-used sentencing terms particularly had application here: Defendant employed a sophisticated ruse to lure the victim to defendant's

home. The trickery included hacking his wife's Facebook account and impersonating her on social media in an elaborate scheme to kill Evora, who defendant was convinced was his wife's lover. There followed a brutal lying-in-wait murder and post-mortem dismemberment of the victim. The metal saw apparently used to cut up the victim was found at the scene after defendant set fire to his residence in an effort to cover up the crime. Family members were at a loss to explain Evora's disappearance. His body was found four days later, decaying, dismembered and placed in three plastic trash bags inside the trunk of Evora's own car.

The probation report, which the trial court read, described the killing as follows: "The dismemberment of victim Evora is a heinous and vile criminal act, which the surviving family has to live with. The defendant's actions displayed the extent he would go through to kill any man he thought was cheating with his wife."

The trial court's sentencing decision and comments plainly indicate an intention to impose a maximum sentence. The court expressly found that no factors mitigated defendant's guilt. There is nothing in this record that suggests that having sentenced defendant to life without parole and having made these comments on the record, the court would have stricken the 25-year firearm enhancement if it had the discretion to do so.

**DISPOSITION**

The judgment is affirmed.

RUBIN, P.J.

We concur:

BAKER, J. MOOR, J.